

Rafael Allendesalazar

Martínez Lage & Asociados – Madrid, Spain



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The Usual Suspects*

written with Roberto Vallina

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Collecting Societies: The Usual Suspects

by *Rafael Allendesalazar* and *Roberto Vallina*¹

A. Introduction

Since the early days of EC competition law, collecting societies have been closely scrutinised by the European Commission and the European Court of Justice.

This comes as no great surprise: collecting societies are ‘guilty’ of at least two original sins from an EC competition law perspective. Firstly, collecting societies are national in scope, whereas one of the central aims of EC competition policy is to integrate national markets into a single and unified European market.² Secondly, collecting societies are associations that enable authors³ to cooperate and sell jointly (*i.e.*, through licensing) their rights under common commercial conditions (including price).⁴ Moreover, this cooperation could also enable the resulting association to occupy not only a dominant position but also a legal or *de facto* monopoly.

These circumstances alone already make collecting societies one of the usual suspects for competition authorities. This has resulted in a number of decisions of the Commission and judgments of the ECJ concerning a wide range of activities of collecting societies (fees, management of rights, agreements between collecting societies, etc.). However, as we will see in this paper, there is also a third element that puts collecting societies in the group of usual suspects: legal uncertainty as to what they can and cannot do.

The main purpose of this paper is to review the existing case law from the point of view of collecting societies. We will try to demonstrate that, despite the apparent clarity of the principles laid down by the case law, some inconsistencies remain and that, in any event, the practical consequences of such principles are unclear. The case law is fairly plain regarding what collecting societies cannot do, but that is certainly not the case when it comes to what collective societies *can* do. Many difficulties remain for those charged with advising a collecting society as to the degree of freedom they have in view of the existing EC case law on competition.

With that in mind, this paper focuses exclusively on two issues concerning collecting societies from an EC competition law perspective: pricing and management of rights (*i.e.* the relationship between collecting societies and their members).

¹ Rafael Allendesalazar is a partner, and Roberto Vallina is an associate, at *Martinez Lage & Asociados* in Madrid.

² See Woods, D., *Collective Management and EU Competition Law*, Antitrust Report, June 2002, p. 30.

³ Or publishers, performers, etc.

⁴ United States courts have been faced with repeated antitrust challenges to the global licensing practices of the American performing rights societies (known as ‘blanket licensing’), *i.e.*, Broadcast Music Inc. (‘BMI’) and the American Society of Composers, Authors and Publishers (‘ASCAP’). In the landmark judgment given in 1979 in the case of *Columbia Broadcasting System v BMI and ASCAP*, 441 US 1, S Ct 1551 (1979), the United States Supreme Court ruled that ‘blanket licensing’ could not be considered to be a *per se* violation of the Sherman Act but must instead be evaluated in terms of a ‘rule of reason’ analysis. See Opinion of AG Jacobs in Case 395/87, *Ministère Public v Tournier* [1989] ECR 2521, point 47 *et seq.*

B. Collecting societies and Article 82 EC

According to settled case law, under Article 82 EC an undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine, undistorted competition on the common market.⁵

The question now is how this special responsibility affects collecting societies. In this context it is useful to remember that, according to settled case law, the actual scope of the special responsibility imposed on an undertaking in a dominant position must be considered in the light of the specific circumstances of each case.⁶ The Commission has further added that the scope of this special responsibility must be determined:⁷ (i) in relation to the degree of dominance held by the undertaking in question; and (ii) having regard to the special characteristics of the market which may affect the competitive situation.

As to the degree of dominance, collecting societies usually enjoy a dominant position in the relevant geographic market or even a legal or *de facto* monopoly. With regard to the special characteristics of the market we should take into account, first of all, the fact that collecting societies manage and license copyrights on behalf of their members. Secondly, as the ECJ stated in *SABAM II*, in applying Article 82 EC to collecting societies, account must be taken of all the relevant interests in order to ensure a balance between them.⁸

In this regard, the ECJ noted that collecting societies are associations whose object is to protect the rights and interests of their individual members against, in particular, major exploiters and distributors of musical material, etc. (hereinafter, the ‘record industry majors’).⁹ In order to ensure a balance between the interests at stake, the ECJ stated in *SABAM II* that restrictions aimed at safeguarding the rights and interests of collecting societies’ members *vis-à-vis* the record industry majors do not breach Article 82 EC if they comply with the principle of proportionality.¹⁰ In other words, the practices must not exceed the limits of what is necessary for the attainment of the legitimate aims pursued by the collecting society.¹¹

Therefore, collecting societies find themselves in a delicate situation. On the one hand, it is not unusual for them to enjoy a *de facto* monopoly or even, depending on the Member State, a legal monopoly. If the special responsibility of a dominant undertaking becomes more onerous depending on the degree of dominance,¹² we have to conclude

⁵ Case 322/81 *Michelin v. Commission* [1983] ECR 3461, at para. 57.

⁶ Case T-83/91 *Tetra Pak International SA v. Commission (Tetra Pak II)* [1994] ECR II-755, at para. 114; Joined Cases C-395 & 396/96 P *Compagnie maritime belge* [2000] ECR I-1365, at para. 114.

⁷ Commission Decision of 25 July 2001, Case COMP/C-1-36.915, *Deutsche Post AG* (OJ L 331 [2001]), at para. 103.

⁸ Case 127/73 *BRT v. SV SABAM and Others* [1974] ECR 313, at para. 8.

⁹ See also, in the context of Article 81 EC, Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521, at para. 31.

¹⁰ In this regard, see Commission Decision of 12 August 2002, in Case C2/37.219, *Banghalter & Honem Christo/SACEM* (‘Daft Punk’), text available at http://www.europa.eu.int/comm/competition/index_en.html.

¹¹ Case 127/73 *BRT v. SV SABAM and others* [1974] ECR 313, at para. 11; Case 395/87 *Ministère Public v. Tournier* [1989] ECR 2521, at para. 31.

¹² This idea is closely linked to the concept of ‘super-dominance’. This expression has been developed by some commentators, but has never been used by the Community Courts or the Commission, and it remains to be seen whether it will be. See in this regard, R Whish *Competition Law* (2003) Lexisnexis, 5th ed., pp. 189-190. (However, to be noted that AG Fennelly used this notion in the Opinion delivered on 29 October 1998 in *Compagnie Maritime Belge* – see *supra* note no. 6 – at para. 136.)

that collecting societies need to be extremely careful in order to ensure that they do not overstep the limits arising from Article 82 EC.

On the other hand, the ECJ has acknowledged that some practices which in principle could be in breach of Article 82 EC are justified in view of the special characteristics of the activities and objectives pursued by collecting societies, provided that such practices comply with the principles of proportionality and indispensability.

What then, if any, are the conclusions to be drawn from this? The first and more obvious conclusion is that the general principles laid down by the case law with regard to Article 82 EC are not automatically applicable to collecting societies. Account must be taken of the context of the practices in question as well as of the objectives pursued by the collecting society. Secondly, the ‘safe harbour’ provided by the case law for collecting societies is a limited one. As collecting societies enjoy significant market power, they should be particularly vigilant in assessing the impact of their practices and should try to ensure that any restrictions they may impose are carefully justified.¹³

C. The level of fees

The level of fees charged by collecting societies has been a traditional issue in EC competition law in recent decades. The fees charged by a collecting society fall mainly into two categories: those charged to the users of its repertoire and those charged to members for the management of their rights.

So far, the case law has only been concerned with the first kind of fees. In principle, we could take the view that the principles laid down with regard to the fees charged to users of collecting societies’ repertoires should also apply to the fees charged to collecting societies’ members. However, there is an important difference: the relationship between a collecting society and its members is not a simple commercial relationship. An author is not merely a ‘client’ of his or her collecting society; he or she is also an affiliated member of the entity. Therefore, the members of the collecting society must comply with the internal rules laid down by its governing bodies, in which the said members are directly or indirectly represented (for instance, through a general assembly). In such cases, when a conflict arises between a collecting society and one or more of its members, it is important to ascertain whether the problem is mainly a civil issue related to the internal relations between the collecting society and its members or whether, on the contrary, the issue at stake has a significant impact on competition.¹⁴

As for the users of the collecting society’s repertoire, the case law is significant. The main cases dealing with the level of fees charged to users are *Tournier*,¹⁵

¹³ See the Opinion of AG Jacobs in Case 395/87 *Ministère Public v. Tournier* [1989] ECR 2521, para. 43.

¹⁴ See also the Commission Decision of 12 August 2002 in Case C2/37.219, *Banghalter & Honem Christo/SACEM* (‘Daft Punk’), at page 8. The Spanish publishers’ case also illustrates this dilemma (see *infra* Section 5.4). Both the Spanish Competition Service and the Spanish Competition Court pointed out that the major publishers were challenging the very same internal rules of SGAE that they had not objected to when internally approved (Decision of the Spanish Competition Court of 16 December 2004 in proceeding number R 609/04, *Ediciones Musicales*).

¹⁵ Case 395/87 *Ministère Public v. Tournier* [1989] ECR 2521.

Lucazeau,¹⁶ and *Basset*,¹⁷ all of which related to the level of fees applied to copyright users.

In *Basset*, the ECJ was asked a very specific question on the interpretation of Article 82 EC. The ECJ had to rule on whether Article 82 EC prevented a collecting society (SACEM), which enjoyed a *de facto* monopoly, from charging two fees on the public performance of sound recordings. Pursuant to national law, SACEM charged the users of its repertoire (i.e., discothèques) a performance royalty as well as a ‘*supplementary mechanical reproduction fee*’. Both royalties were also applied for the use of sound recordings coming from Member States where such a supplementary fee was not provided for in national law.

The ruling of the ECJ was straightforward: the fact that a collecting society makes use of the possibilities made available to it by national legislation for the collection of fees does not in itself constitute a breach of Article 82 EC. Nevertheless, the ECJ added an important exception to this statement. Despite the fact that the application of two fees for the same use of the work is not in itself contrary to Article 82 EC, it could be that the combined royalties may be such that Article 82 EC applies. The approach of the ECJ tries to avoid formalisms: from the perspective of Article 82 EC, the key element is the global fee charged to the user and not how that fee is perceived.

This ruling thus left open the question of the amount of the royalties and its compatibility with Article 82 EC. This question was one of the main issues in the *Tournier* and *Lucazeau* cases two years later, where the ECJ was asked to rule on a number of questions involving the fees charged by SACEM to discothèques.

It was argued that the fees charged by SACEM were excessive and therefore amounted to unfair trading conditions within the meaning of Article 82 EC. The discothèque operators, supported by the Commission, put forward two arguments in this respect. Firstly, they argued that the fees were unfair on the grounds of the differences between the rate applied to discothèques and that applied to other large-scale users of recorded music, such as radio and television stations. The ECJ rejected the argument, because the discothèque operators did not put forward any basis on which a reliable and consistent comparison could be made.

The Commission and the discothèque operators also suggested another criterion in order to show that the fees applied by SACEM were unfair: a comparison with the rates applied in other Member states. The ECJ accepted this criterion, and held that a national collecting society imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, provided that:

- (i) The rates are compared on a consistent basis; and
- (ii) The collecting society cannot justify such differences by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in other Member States.

Before analysing in depth the reasoning of the ECJ in the *Tournier* and *Lucazeau* cases, we would like to make a preliminary observation. In our view, the key element when ascertaining whether the fees charged are unfair is the comparison of rates on a consistent basis. There is no reason to suppose that this comparison can only be made with the fees charged in other Member States. The ECJ explicitly chose this criterion because it was the only one where the data filed by the parties made possible a comparison of rates on a consistent basis.

¹⁶ Joined Cases 110/88, 241/88 and 242/88 *Lucazeau and Others v. SACEM and Others* [1989] ECR 2811.

¹⁷ Case 402/85 *G. Basset v. SACEM* [1987] ECR 1747.

Therefore, the application of other criteria can be foreseen (*e.g.*, the fees charged in the past, or those charged to other users), provided that rates are compared on a consistent basis. Moreover, we think that, to compare rates is not the only acceptable method in order to ascertain whether the fees charged are unfair within the meaning of Article 82 EC. At least in theory, we could try to analyse whether the price is excessive or unfair in relation to the economic value of the service provided.¹⁸ We will come back to this point later at Point 4.

At first glance, these three rulings seem to establish some relatively clear principles on the application of EC competition law to collecting societies. However, these cases proceed from narrow bases and difficulties remain for anyone charged with advising a collecting society as to the degree of freedom that it has in relation to its fees policy. A number of questions arise if we try to apply the *Tournier* and *Lucazeau* cases to the fees policy of a collecting society:

- Whom to compare with? (1);
- What does ‘appreciably higher,’ mean? (2);
- The burden of proof and the objective dissimilarities that could justify the application of different rates (3); and
- Is the *United Brands* doctrine applicable? (4).

1. Whom to compare with?

The first problem lies in whose rates should be compared with those of the collecting society in question. The language used by the ECJ varies from “*the situation prevailing in all the other Member States*”¹⁹ to “[*the fees*] charged in other Member States”.²⁰

In the *Tournier* and *Lucazeau* cases, the data submitted to the ECJ showed that SACEM’s fees were clearly well above the fees charged in all the other Member States.²¹ However, the reality is rarely that clear. On many occasions the fees charged by the collecting societies are very different from one country to another but still similar to the rates applied in a number of Member States. Thus, if we have to advise a collecting society on the lawfulness of its fees, whom should we compare it with? Moreover: what if the fees charged are well above the fees charged in the majority of Member States but similar to the fees charged in some other Member States?

If we interpret *Tournier* and *Lucazeau* narrowly, we could take the view that the fees applied by a collecting society are unfair only if they are appreciably higher than the fees charged in all the other Member States. However, such a narrow construction of *Tournier* and *Lucazeau* seems neither logical nor consistent with the expression “[*the fees*] charged in other Member States”, which is the one most frequently used by the ECJ in the said rulings.

In fact, in the *Tournier* and *Lucazeau* cases the data submitted by the Commission suggested that the applicable rates in France were many times higher than

¹⁸ See Case 27/76 *United Brands v. Commission* [1978] ECR 207; Case 226/84 *British Leyland* [1986] ECR 3263; Case 26/75 *General Motors* [1975] ECR 1367.

¹⁹ Joined Cases 110/88, 241/88 and 242/88 *Lucazeau* [1989] ECR 2811, at para. 254.

²⁰ Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521, at para. 37.

²¹ However, the accuracy of said data was strongly criticized in the submissions made before the ECJ. To that effect, see the Opinion of AG Jacobs in Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521, para 61.

the rates applied in the UK or in Germany, for example, but only slightly higher than those applied in Italy.²²

So the question is: what constitutes a valid point of reference in order to establish that the fees charged by a collecting society are unfair?

The answer is unclear because the facts in the *Tournier* and *Lucazeau* cases were rather unusual. It is indeed quite exceptional for the fees of a collecting society to be above the rates applied in all other Member States and well above the rates applied in the majority of the Member States. In practice, the context is a little more complicated. In that light, can we apply the *Tournier* and *Lucazeau* rulings to situations that can be clearly distinguished from the facts of those cases?

Let us imagine that we are advising a collecting society in the European Union. This collecting society applies one of the highest fees out of the 25 Member States, together with another 7 collecting societies. The fee charged per licence by our collecting society is 207 euros. The fees charged in the other 7 countries range from 200 to 210 euros per licence. There is a second group of 9 countries in which the fees range from 100 to 115 euros per licence. Finally, there is a third group of 8 countries, in which collecting societies charge between 50 and 60 euros per licence. This situation is summarized in the following table:

	Fees charged	Number of countries
Cluster A	200-210	8
Cluster B	100-115	9
Cluster C	50-60	8

What should be the answer in this case? The solution is not self-evident.

The fees charged by our collecting society are higher than the fees charged in Group B countries and much higher than the fees charged in Group C countries. On the one hand, such differences could be regarded as indicative of the unfairness of the fees charged. On the other hand, there are seven other countries that apply similar rates, which is a strong argument in favour of the compatibility of the fees charged with Article 82 EC.

Let us push the example a little further. If we ask the collecting societies in Group A to justify the differences between their fees and the fees applied in the countries of Groups B and C, it will be difficult for them to justify such differences objectively. Nevertheless, the point is that it will also be difficult for collecting societies in Group B to justify the differences between their rates and the rates applied in Group C countries.

The answer becomes even more difficult if we consider that, unless we read the *Tournier* and *Lucazeau* cases as an invitation for collusion or a single price policy for collecting societies in the EU, the existence of differences between the rates applied in each Member States seems not only legitimate but also absolutely normal.

The conclusions that can be drawn from these cases are not straightforward. The situation described in the *Tournier* and *Lucazeau* cases is quite unusual and the principles laid down in those cases do not provide clear guidance for the majority of the situations that collecting societies must face. The first conclusion could be that absolute legal certainty is hard to achieve for a collecting society unless it aligns its fees with the lowest prevailing in the EU.

²² *Ibid.*

The second conclusion could be that the criteria that determine that the fees charged are unfair are essentially subjective. It is neither the level of the fee itself nor the value of the service rendered to the user that determines whether the fee is unfair or not. The legality of the fees charged by a collecting society depends mainly on the policies adopted by other collecting societies and not on the behaviour of the collecting society itself.

2. “Appreciably higher”

The second problem is to ascertain when the fees charged are ‘*appreciably higher*’ than those charged in other Member States within the meaning of the *Lucazeau* and *Tournier* cases.

Those cases came to the ECJ within the framework of Article 234 EC (i.e., at the material time, Article 177 EC), so the ECJ did not decide on the facts of the case but merely offered general guidance to the referring court. However, the ECJ took into account the fact that the findings of an inquiry conducted by the Commission indicated that the fee charged by SACEM was “*many times higher than that charged in other Member States*”. It is worth noting that the results of this inquiry took into account the global amount due to SACEM in view of the fact that, pursuant to French legislation, discothèque operators must pay not only a performance royalty but also a ‘*supplementary mechanical reproduction fee*’.

Once again, the solution reached is consistent with the context in which those cases were referred to the ECJ: a fee that is many times higher than the fees applied in other Member States is regarded as unfair within the meaning of Article 82 EC. The problem now is how to apply this case law to the vast majority of the cases involving the fee policies of collecting societies, because such extreme situations are rare. As we have said before, we think that differences between the fees charged by collecting societies are perfectly legitimate (unless we read the *Tournier* and *Lucazeau* cases as an invitation for collusion), but it is unclear how big these differences can be.

The fact that the ECJ also used the expression “*many times higher*”²³ is only helpful if we construe the expression “*appreciably higher*” narrowly. In fact, it is relatively unusual for the fees charged by a collecting society to be “*many times higher*” than those charged in other Member States. But then: is a 30% difference “*appreciably higher*”? Or should it be a 60% difference? Or even a 120% difference?

The case law on collecting societies does not provide any practical guidance to answer these questions. In another context, the ECJ considered in *United Brands* that a difference of “*about 7% [...] cannot automatically be regarded as excessive and consequently unfair*” (emphasis added).²⁴ But it is clear that this case, which concerned the price differences applied by one company on its sales in different Member States of a homogeneous agricultural product (bananas), cannot be applied to the fees charged by a collecting society.

Taking the question still further, what should we understand by the rates applied in a Member State? Many collecting societies have a standard fee but also apply discounts for prompt payment to members of trade associations who have negotiated agreements which include more favourable conditions, or to users who provide a service

²³ The expression “many times higher” could also be open to discussion. Does it mean one and a half times higher? Two times higher? Three or more times higher?

²⁴ Case 27/76 *United Brands v Commission* [1978] ECR 207, at para. 266.

to the collecting society (*e.g.*, by providing additional information that facilitates the collection of royalties), etc. If the discounts are substantial (and it is not unusual for discounts to be cumulative), the standard fee could be high but the fees actually charged could be significantly lower. Despite the fact that the ECJ did not explicitly deal with this issue in *Tournier* and *Lucazeau*, we think that the most reasonable approach is to compare the rates usually applied in each Member State.

One conclusion on this point could be that the *Tournier* and *Lucazeau* cases only provide guidance in extreme cases. The solution is straightforward only if the fees are many times higher than those applied in other Member States. In contrast, the solution is ambiguous in the vast majority of cases where the differences between the rates applied in the Member States are not so huge. At the end of the day, this implies considerable legal uncertainty for a collecting society unless all of them operate the same pricing policy.

3. The burden of proof and objective dissimilarities that could justify the application of different rates

The ECJ ended its reasoning in *Tournier* and *Lucazeau* by stating that a collecting society would not be imposing unfair trading conditions if, despite having charged its users fees that are appreciably higher than those charged in other Member States, the collecting society in question is able to justify the difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

Thus, rates that are appreciably higher than those applied in other Member States do not automatically fall within the scope of Article 82 EC. It must first be examined whether there are any objective and relevant dissimilarities between Member States that justify these differences. Furthermore, it follows from the ECJ's reasoning that, in such cases, the burden of proof shifts to the collecting societies.

What objective and relevant dissimilarities could justify the existence of differences between the rates applied in the Member State in question and in the other Member States?

The ECJ stated that dissimilarities should be both '*objective*' and '*relevant*'. In our opinion, the fact that the dissimilarities must be '*objective*' suggests that such dissimilarities must not depend on the will of the collecting society in question. In addition, the fact that the dissimilarities must be '*relevant*' suggests that such dissimilarities must be proportional to the volume of the differences between the fees applied. Minor dissimilarities should not justify major differences.

It is interesting to note how narrowly the ECJ interpreted the concept of '*objective and relevant dissimilarities*' in *Tournier* and *Lucazeau*. For instance, SACEM submitted that the differences were justified on the grounds of the traditionally high level of protection provided by copyright in France. In particular, pursuant to national law, SACEM applied two royalties to disothèque operators: a performance royalty plus a '*supplementary mechanical reproduction fee*'. Such additional payment for the right of mechanical reproduction also existed in Belgium, but not in any of the other Member States.

As AG Jacobs rightly pointed out, the fact that national legislation provides for an additional payment for the right of mechanical reproduction is a factor which will

necessarily boost the overall level of the royalty charged in those countries.²⁵ However, the ECJ dismissed this argument and applied its earlier judgment in *Basset* in quite a formalistic manner:²⁶

“As the Court held in its judgment in Case 402/85 *Basset v. Sacem* [1987] ECR 1747, the supplementary reproduction fee may be seen, disregarding the concepts used by French legislation and practice, as constituting part of the payment for an author’s rights over the public performance of a recorded musical work and therefore fulfils a function equivalent to that of the performing right charged on the same occasion in another Member State”.

We share the view of AG Jacobs. If French law provides for a ‘*supplementary mechanical reproduction fee*’, this must be interpreted as a measure aiming to increase the incomes of right holders. Thus, the existence of this ‘*supplementary mechanical reproduction fee*’ should have been taken into account as an objective dissimilarity.

However, it might well be the case that the ECJ implicitly considered that this objective dissimilarity was not ‘*relevant*’. The existence of a supplementary fee could justify some increase in the rates applied, but it is hardly reasonable that it could justify the application of rates many times higher than those applied in Member States where the users need only pay a single royalty. If this was the reasoning of the ECJ, it should have acknowledged that such a supplementary fee was an objective dissimilarity which, however, could not in itself justify the existence of such broad differences in royalties. SACEM also put forward two other arguments in order to justify the differences between the rates of royalty charged in the various Member States: (i) the high prices charged by discothèques in France; and (ii) the level of its operating expenses and, in particular, its monitoring expenses.

The ECJ not only refused to accept those arguments, but virtually considered these circumstances to be evidence of the unfairness of the fees charged. The ECJ considered that the high prices charged by discothèques may be the result of several factors, including the high level of royalties payable for the use of recorded music. As for the level of operating expenses, the ECJ considered that, if the level of operating expenses of a collecting society is considerably higher in one Member State than in the other Member States, “the possibility cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties”.

In *Tournier and Lucazeau*, the ECJ was extremely reluctant to accept any of the arguments advanced by SACEM in order to justify the existing differences in royalties, requiring a high standard of proof. This approach might well be explained by the particularities of the case, *i.e.*, the extraordinarily large differences between the rates applied in France and those applied in other Member States.

The problem is that, however exceptional the circumstances of *Tournier* and *Lucazeau* were, these cases remain the sole applicable case law for collecting societies and probably remain two of the few cases in which Article 82 EC has been applied to excessive pricing. Accordingly, the current state of the law seems to impose on collecting societies a high standard of proof as regards the existence of objective and relevant dissimilarities that justify the application of different rates. Under these circumstances, it is extremely difficult for collecting societies to ascertain whether or

²⁵ Opinion of AG Jacobs in Case 395/87, *Ministère Public v Tournier* [1989] ECR 2521, points 60 and 62.

²⁶ *Ibid.*, at para. 40.

not such objective and relevant dissimilarities are present and, in consequence, whether or not the rates applied are compatible with Article 82 EC.

4. Is the *United Brands* doctrine applicable?

In his opinion delivered in *Tournier* and *Lucazeau*, AG Jacobs pointed out that:

“There is a consensus in the observations made to the Court in these cases that the test laid down in Case 27/76 *United Brands v Commission* [1978] ECR 207 for determining whether a price is excessive in relation to the economic value of the benefit conferred is inapplicable in the present context. In that judgment, the Court indicated (in relation to a product rather than a service) that it is necessary to consider whether the difference between the costs actually incurred in producing the product and the price actually charged is excessive and, if the answer to that question is in the affirmative, whether a price has been imposed which is unfair in itself or when compared with competing products (paragraph 252 of the judgment). It is pointed out that it is inappropriate in the present context to proceed on the basis of a comparison between the costs of production and the selling price because it is impossible to determine the cost of the creation of a work of the imagination such as a musical work. It is moreover impossible to compare the level of the royalties charged by Sacem with that of competitors because there are none”.

We respectfully disagree with some of these points. We agree that the cost structure approach is not applicable, but we think that it is indeed relevant to ascertain whether or not the price bears a reasonable relation to the economic value of the product or service supplied.

In *United Brands*,²⁷ the ECJ stated that a price is excessive and therefore unfair within the meaning of Article 82 EC when it has no reasonable relation to the economic value of the product or service supplied. This approach can also be found in *General Motors*²⁸ and *British Leyland*.²⁹ The ECJ considered that there are many ways to prove that a price bears no reasonable relation to the economic value of the product or service supplied.

Amongst these, the ECJ suggested in paragraph 251 of *United Brands* that a price can be deemed excessive by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin. In paragraph 252 of *United Brands*, the ECJ developed the following test:

“[T]he questions to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products”.

We agree that the analysis of production costs and cost structure is an approach that is hard to transpose to collecting societies, where one cannot have full recourse to the objective notions of fixed costs, variable costs, profit margin and sale price of

²⁷ Case 27/76 *United Brands v. Commission* [1978] ECR 207, at para. 250.

²⁸ Case 26/75 *General Motors* [1975] ECR 1367.

²⁹ Case 226/84 *British Leyland* [1986] ECR 3263.

competitive products or services.³⁰ However, the analysis of the dominant undertaking's cost structure was only one possible method of proof. As the ECJ explicitly stated, "other ways may be devised – and economic theorists have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair".³¹

The *ratio decidendi* in *United Brands* (as in the *General Motors* and *British Leyland* cases) was whether or not a price bears a reasonable relation to the economic value of the product or service supplied. This is indeed an approach that could be applied to collecting societies. Indeed, the economic value of the work for the user has traditionally been a point of reference in copyright law for determining the equitable remuneration for the use of a given work.³²

Further, if the cost structure approach is not applicable to collecting societies, we think that other ways to prove that a price bears no reasonable relation to the economic value of the product or service supplied might be devised, including those proposed by economists.³³

For instance, some commentators have proposed that, in order to evaluate whether the remuneration level for the use of a work protected by copyright is unfair within the meaning of Article 82 EC, it could be useful to take account of:³⁴ the importance of the music for the user in question, the proportion of the remuneration paid for the music in relation to other charges cited by the user (*e.g.*, the costs it incurs in selling drinks, its tax burden and the costs of paying its employees), and the remuneration level of copyrights in the Member State in question.

An analysis combining the economic value of the service supplied (*i.e.*, the value of the use of a work in trade) and the comparison of the rates applied in the different Member States has several advantages. First, it introduces an objective criterion. It does not rely solely on the level of the rates applied in other countries, which is not only difficult to determine, as we have seen, but which also could vary from time to time. Second, it is linked to consumer welfare: high prices would be acceptable if the value of the service provided is proportional to such prices. Third, it will result in a more consistent policy approach, because the principles applied to collecting societies' fees policies would be similar to those applied to other undertakings under Article 82 EC. Fourth and finally, it will be also consistent with the principles applied in the area of copyright law.

D. Fees and discrimination

An interesting Spanish case gives us another perspective on the application of EC competition law to the fees of collecting societies: the problem of discrimination between users.

In 1997 a Spanish music recorder, VALE MUSIC, requested a licence from SGAE for the use of its repertoire as a phonogram manufacturer. SGAE granted such a

³⁰ T. Desurmont "The SACEM and Competition Law" (1989) 140 RIDA, p. 116.

³¹ Case 27/76 *United Brands v. Commission* [1978] ECR 207, at para. 253.

³² In this regard, see Case C-245/00, *SENA* [2003] ECR I-1251, at para. 37.

³³ See, *e.g.*, the proposal of Evans and Padilla for a 'modified *per se* illegality' rule or for a 'structured rule of reason' (D Evans and J Padilla "Excessive Prices: Using Economics to Define Administrable Legal Rules" (2004 LECG Discussion Paper Series — forthcoming in *Journal of Competition Law & Economics*).

³⁴ T. Desurmont "The SACEM and Competition Law" (1989) 140 RIDA, p. 116.

licence, and from 1997 to 1999 it charged VALE MUSIC the standard fee for that kind of licence.

In 1999, VALE MUSIC applied for a reduction of the fees equivalent to the reduction applied to phonogram manufacturers who were members of AFYVE (a manufacturers' association). SGAE refused to grant this rebate because VALE MUSIC was not a member of AFYVE. SGAE argued that the members of AFYVE benefit from more favourable terms because they undertake to respect special contractual commitments and because AFYVE undertakes to assist SGAE in the collection of royalties, providing it with information and support. Furthermore, the agreement reached between SGAE and AFYVE also provided for the implementation of an amicable dispute resolution mechanism.

VALE MUSIC did not accept the arguments of SGAE and filed a complaint before the Spanish competition authorities in 1999. VALE MUSIC submitted that SGAE's decision to apply the standard fee to it was discriminatory and thus an abuse of a dominant position under Spanish competition law.³⁵ In 2002, the Spanish Competition Court³⁶ found that SGAE had abused its dominant position by charging discriminatory prices since it applied a rate to VALE MUSIC that was 37% higher than the rate applied to AFYVE's members.

The decision reached by the Spanish Competition Court is somewhat surprising. The court assumed that VALE MUSIC was in a similar situation to the members of AFYVE, a trade association that groups together phonogram manufacturers. It failed to take account of the fact that AFYVE's members have agreed special contractual conditions in their licence agreements and that they account for more than 80% of the sales in the Spanish music market.³⁷

Three facts seem to explain the decision reached in this case. Firstly, the Spanish Competition Court paid special attention to the fact that SGAE enjoyed a *de facto* monopoly. The Spanish Competition Court seemed to implicitly consider that the limitations arising from competition law for an undertaking enjoying a '*super-dominant*' position are particularly strict, and that discriminatory practices are thus seldom justified.

Secondly, the fact that the difference in the rates applied was 37% had a decisive influence. In the view of the Spanish Competition Court, none of the arguments put forward by SGAE justified such a big difference. The implicit reasoning seemed to be that the cost savings arising from the SGAE-AFYVE agreement were not proportional to the reduction granted.

Thirdly, SGAE refused to negotiate the economic terms of the licence with VALE MUSIC, whereas under the Spanish Copyright Act, collecting societies would be under a duty to negotiate the terms of the licence with the users of their repertoire. Assuming that collecting societies and users obtain efficiencies through collective negotiation, this case illustrates once again how hard it is to justify specific fee levels or practices once they are under the scrutiny of competition authorities. Granting rebates to users belonging to trade associations is a perfectly accepted practice all over the EU.³⁸

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³⁵ The relevant provision was Article 6(1)(d) of the Spanish Competition Act (Ley 16/1989 de 17 de Julio de Defensa de la Competencia), which is equivalent to Article 82 EC.

³⁶ That is, the *Tribunal de Defensa de la Competencia*.

³⁷ Indeed, two of the members of the Spanish Competition Court issued dissenting opinions: from their point of view, the members of AFYVE and VALE MUSIC were not in an equivalent situation.

³⁸ Such is the case, for example, in Germany, Belgium and France, amongst others. As for France, see the Opinion of AG Jacobs in Case 395/87, *Ministère Public v. Tournier* [1989] ECR 2521, points 12 *et seq.*

monopoly. The Spanish Competition Court seemed to implicitly consider that the limitations arising from competition law for an undertaking enjoying a ‘*super-dominant*’ position are particularly strict, and that discriminatory practices are thus seldom justified. Secondly, the fact that the difference in the rates applied was 37% had a decisive influence. In the view of the Spanish Competition Court, none of the arguments put forward by SGAE justified such a big difference. The implicit reasoning seemed to be that the cost savings arising from the SGAE-AFYVE agreement were not proportional to the reduction granted. Thirdly, SGAE refused to negotiate the economic terms of the licence with VALE MUSIC, whereas under the Spanish Copyright Act, collecting societies would be under a duty to negotiate the terms of the licence with the users of their repertoire. Assuming that collecting societies and users obtain efficiencies through collective negotiation, this case illustrates once again how hard it is to justify specific fee levels or practices once they are under the scrutiny of competition authorities. Granting rebates to users belonging to trade associations is a perfectly accepted practice all over the EU. It can significantly reduce the operational costs of collecting societies and eliminates potential sources of conflict with users. However, in the case of collecting societies, it is extremely hard to measure cost savings in a precise manner and almost impossible to demonstrate that such costs savings are proportional to the rebate granted.

E. Management of rights: the relationships between collecting societies and their members

We have already seen that a collecting society occupying a dominant position may breach Article 82 EC if it imposes unfair conditions on its members for the management of their rights. We have also seen that restrictions that are limited to what is necessary for the attainment of the legitimate aims of such collecting societies do not fall within the scope of the Article 82 EC prohibition.

These principles are especially important within the framework of the management of the rights of collecting societies’ members. The leading cases in this area are the Commission’s decisions in the *GEMA* cases³⁹ and the ECJ’s ruling in *SABAM III*.⁴⁰ More recently, the Commission’s Decision in *Daft Punk* gave a further turn of the screw to this case law.⁴¹

Prior to these decisions, it was not unusual for collecting societies to require their members to assign all their copyrights without drawing any distinction between specific categories of such rights. In the cases we have mentioned, the Commission and the ECJ decided that such practices could fall within the scope of Article 82 EC if they exceeded what was necessary for the attainment of the collecting societies’ legitimate aims.

³⁹ Commission Decision 71/224/EEC of 2 June 1971, Case IV/26.760, *GEMA I* (OJ L 134/15); Commission Decision 72/268/EEC of 6 July 1972, Case IV/26.760, *GEMA II* (OJ L 166/22). See also Commission Decision 82/204/EEC of 4 December 1981, Case IV/29.971, *GEMA III* (OJ L 94/12); *GEMA IV*, *XVth Report on Competition Policy* (1985), point 81.

⁴⁰ Case 127/73, *BRT v SV SABAM and others* [1974] ECR 313.

⁴¹ Commission Decision of 12 August 2002, Case C2/37.219, *Banghalter & Honem Christo/SACEM* (*Daft Punk*). Decision available at http://www.europa.eu.int/comm/competition/index_en.html.

The first case in which the Commission attempted to strike a balance between the interests at stake was *GEMA I*.⁴² In that case, the Commission ruled that, in order not to breach Article 82 EC, the German collecting society GEMA should give its members the right to assign their rights to it in their entirety or to divide them by category and to assign different rights to different authors' rights societies.⁴³ GEMA's members should also be entitled to withdraw the administration of certain categories of rights after due notice at the end of each year and without losing membership status or incurring penalties.

In *GEMA II*, the Commission provided further guidance on the implementation of the principles laid down in *GEMA I* with regard to the management of rights.⁴⁴ According to the Commission, it was incumbent on GEMA to give its members a choice: they could elect either to withdraw the administration of one or more of the seven original categories from the collecting society after due notice at the end of the year or, alternatively, to withdraw the administration of certain forms of utilization from GEMA after due notice at the end of a maximum of three years.⁴⁵ On the other hand, the Commission also accepted that, in order to ensure an effective management of rights, GEMA was entitled to require the assignment of all the works of a member within a single category or utilization right and to refuse the withdrawal of rights other than by category or utilization right.

In *SABAM II*, the ECJ was asked to decide on the compatibility with Article 82 EC of, amongst other practices,⁴⁶ the policy of a collecting society (SABAM) to require its members to assign all their present and future rights.

The ECJ scrutinised SABAM's practices and held that, in this area, account must be taken of all the relevant interests. In particular, with regard to the management of the rights of members of collecting societies, the ECJ stated that it is necessary to ensure a balance between the requirement of maximum freedom for authors, composers and publishers to dispose of their works and the requirement for the effective management of their rights by a collecting society.

Furthermore, the ECJ held that it is also necessary to take account of the fact that a collecting society is an association whose object is to protect the rights and interests of its individual members against, in particular, major exploiters and distributors of musical material, such as broadcasting bodies and record manufacturers, etc. (*i.e.*, the record industry majors). This principle was restated in *Tournier*, where the ECJ held that:

⁴² Commission Decision 71/224/EEC of 2 June 1971, Case IV/26.760, *GEMA I* (OJ L 134 [1971]).

⁴³ The categories of rights in *GEMA I* were: (i) the general performing right; (ii) the broadcasting right (including rights of transmission); (iii) the right of cinematographic representation; (iv) the right of mechanical reproduction and diffusion (including transmission rights); (v) the right of cinematographic production; (vi) the right to produce, reproduce, diffuse and transmit on bases for optical sound; (vii) the right of exploitation resulting from technical development or a change in the law in the future.

⁴⁴ Commission Decision 72/268/EEC of 6 July 1972, Case IV/26.760, *GEMA II* (OJ L 166 [1972]).

⁴⁵ The 'forms of utilization' consist of a list of 12 'utilization categories'. They are similar to the original seven categories, but more narrowly defined. These utilization categories are: (i) the general performance right; (ii) the broadcasting right; (iii) the public performance right of broadcasting works; (iv) the television rights; (v) the public performance right of televised works; (vi) the right of cinematographic exhibition; (vii) the right of mechanical reproduction and diffusion; (viii) the public performance right of mechanically produced works; (ix) the cinematographic production right; (x) the right to produce, reproduce, and diffuse on video tape; (xi) the public performance right of works reproduced on video tape; and (xii) the exploitation rights resulting from technical developments or future changes in the law.

⁴⁶ An example of such a practice would be the collecting society continuing to exercise the rights assigned by a member for five years after their withdrawal, without having to give an account of its actions.

“Copyright-management societies pursue a legitimate aim when they endeavour to safeguard the rights and interests of their members vis-à-vis the users of recorded music. The contracts concluded with users for that purpose cannot be regarded as restrictive of competition for the purposes of Article [81] unless the contested practice exceeds the limits of what is necessary for the attainment of that aim.”

The ECJ thus laid down a proportionality test: measures that do not exceed the limit necessary for the attainment of the legitimate aims of collecting societies do not fall within the scope of the prohibition laid down by Article 82 EC.

In all these cases, both the Commission and the ECJ tried to ensure a careful balance of interests. However, this approach was recently called into question to a certain extent. As the former Deputy Head of Unit for Media and Music Publishing at the Directorate General for Competition in the Commission has said, that balance of interests was fixed in the analogue era, so the Commission considered it necessary to review it in the digital era.⁴⁷

This was indeed the Commission’s approach in the so-called *Daft Punk* case. In December 1996, the two members of the music group Daft Punk wanted to become members of SACEM but wished to individually manage their rights for internet exploitation, CD, DVD etc. They therefore applied to become members of SACEM in respect of all of their rights in France except for two categories of rights: the right for mechanical reproduction and diffusion (including transmission rights), and the right of exploitation resulting from technical development or a change in the law in the future. SACEM refused their application and informed them that partial withdrawal of rights was possible only if another collecting society was appointed in respect of the excluded rights.

Consequently, they lodged a complaint with the Commission, alleging that SACEM was in breach of Article 82 EC. The Commission interpreted this refusal as a ban on individual management of the rights in question, which would only be compatible with Article 82 EC if it did not exceed the limit absolutely necessary for the attainment of the legitimate aims pursued by SACEM. In this regard, SACEM submitted that the ban on individual management of rights: (i) protected artists from the unreasonable demands of the record industry; and (ii) prevented a creaming-off of the most valuable rights, which would be contrary to the solidarity principle that governs the collective management of rights.

The Commission considered that such a policy did not fulfil the proportionality test laid down in *SABAM II* and therefore amounted to an abuse of SACEM’s dominant position. The Commission based its reasoning on the following three arguments.

- (i) Firstly, technical progress enables authors to manage some of their rights individually. The new technologies have reduced transaction costs, making individual management economically and technically possible.
- (ii) Secondly, individual management of rights reinforces the moral rights of the authors. Authors who individually manage their rights can control the way their works will be used more effectively.
- (iii) Thirdly, the fact that few collecting societies impose limits of this kind proved that these measures were not indispensable.

In view of the Commission’s position, SACEM agreed to modify its statutes. The members of SACEM are thus entitled to apply for partial withdrawal of the rights assigned and each application will be considered individually by SACEM on a case-by-

⁴⁷ D Woods “Collective Management and EU Competition Law” (2002) *Antitrust Report*, p. 30.

case basis. The amendment also provided that both the application and the decision of the executive board of SACEM must be reasoned.

The Commission accepted this modification, pointing out that SACEM can only ‘exceptionally’ refuse an application for the individual management of rights, and can only do so provided that such refusal is reasoned and based on objective reasons. The Commission explicitly acknowledged the right of SACEM to examine each application for individual management of rights in order to monitor:

- (i) The ‘quantitative’ evolution of the individual management of rights; and
- (ii) The technical problems that could arise in connection to the individual management of rights.⁴⁸

The *Daft Punk* case opened the door for the individual management of rights, but questions remain with regard not only to how the individual management of rights should be implemented but also to the consistency of the Commission’s reasoning. In order to analyse this, we will first of all discuss the Commission’s reasoning (section 4.1). Secondly, we will deal with the conditions on which a collecting society can refuse an application for the individual management of rights (section 4.2). Thirdly, we will see how the *Daft Punk* case could affect the fees charged by collecting societies (section 4.3). Fourth and finally, we will see how the *Daft Punk* doctrine was applied in a recent Spanish case concerning SGAE (section 4.4).

1. The reasoning of the commission in *Daft Punk*

The reasoning of the Commission in *Daft Punk* is unclear and inconsistent with the arguments put forward by SACEM.

SACEM alleged that some limits on the individual management of rights were justified, as such limits: (i) protect artists from the unreasonable demands of the record industry; and (ii) prevent a creaming-off of the most valuable rights, which would be contrary to the solidarity principle.

The Commission considered that those arguments were insufficient. According to the Commission, the restrictions imposed by SACEM did not fulfil the proportionality test because: (i) technical progress makes the individual management of rights economically and technically possible; (ii) individual management of rights reinforces the authors’ moral rights over their works, providing them with more control over the utilization of their works; and (iii) finally, the fact that only a few collecting societies impose limits of this kind proved that these measures were not indispensable. The Commission’s reasoning seems to some extent to be inconsistent with the arguments put forward by SACEM.

The fact that the individual management of rights is now technically and economically possible does not change the fact that the assignment of rights to a collecting society protects artists from the unreasonable demands of the record industry. It must be borne in mind that, according to the ECJ, collecting societies are associations whose “object is to protect the rights and interests of its individual members against, in particular, major exploiters and distributors of musical material, such as radio broadcasting bodies and record manufacturers”. These restrictions are aimed at

⁴⁸ The Commission provided some examples: identification and categorization of internet-related rights, identification of the forms of utilization of works according to rights categories, identification of the rights still managed by the collecting society and the impact on the reciprocal representation agreements concluded with other collecting societies.

preventing authors from being abused by major exploiters and distributors of musical material: in view of their daily experience, collecting societies fear that authors could otherwise be compelled to assign their rights to the record industry majors.

In the *SABAM II* case, there was no reference made to the question of whether or not it was feasible to manage some of the rights assigned to SABAM individually. The *ratio decidendi* in *SABAM II* concerned whether less restrictive measures could be foreseen in order to protect authors from the record industry majors. In fact, it is unclear to what extent, if any, technical progress is protecting authors from the demands of the record industry.

The Commission also submits that individual management of rights reinforces the authors' moral rights, providing them with more control over the utilization of their works. However, it is not true that the assignment of rights to a collecting society lessens the degree of control of an author over the utilization of his or her works. Firstly, the assignment of rights to a collecting society does not necessarily result in the author losing control of his or her works. The author can still require the collecting society to make the licences of his or her works subject to certain conditions. Secondly, collecting societies are much better placed to monitor respect for the author's rights than individuals. Collecting societies have more resources and are more experienced and more effective. Each author profits from the whole enforcement mechanism that collecting societies have for the protection of their repertoires.

Moreover, the Commission does not explain why technical progress or the reinforcement of an author's moral rights diminish the risk to the solidarity principle that arises from the creaming-off of the most valuable rights.

The third argument of the Commission is, at first glance, the most appealing: only a few collecting societies impose limits on the individual management of rights. In this regard, the Commission also takes account of the fact that, in cases where collecting societies do authorize the individual management of rights, few authors have chosen this option. The Commission draws two conclusions from this. Firstly, if there is a substantial risk of authors being deprived of their rights by record industry majors, one would expect a higher number of applications for individual management in the countries where such an option exists. Secondly, the Commission considers that the fact that only a few authors have chosen this option also demonstrates that there is no real risk of creaming-off.

However, the mere fact that only a few collecting societies impose limits on the individual management of rights should not be conclusive. The circumstances and practices prevailing in the music industry vary from one country to another. Furthermore, the fact that few authors have chosen to manage their rights individually, where it is possible to do so, could be explained in many different ways and does not necessarily constitute proof of the absence of unreasonable demands on the part of the record industry. The current figures for authors applying for individual management of rights do not represent a true indication of the risk posed by creaming-off. The appraisal of the Commission is only valid in a short-term context. The number of authors who want to manage their rights individually could be low at the beginning, but this could well be an ever-increasing figure, especially if we consider that the internet is an area that is particularly suitable for the individual management of rights.

Yet it is true that the fact that several other collecting societies allow the individual management of rights could be a strong indication that SACEM's policy did not fulfil the proportionality test. As a matter of fact, it is very hard for a collecting society to prove that such measures are indispensable if many other collecting societies do not impose them. In practice, this puts the burden of the proof on the collecting

society in question, who must explain why individual management is feasible in some Member States but not in the Member State concerned.

2. Rejecting applications for the individual management of rights after *Daft Punk*

The Commission's Decision in *Daft Punk* does not mean that any application for the individual management of rights must be automatically accepted. Collecting societies can still refuse such applications if:

- the application is not motivated;⁴⁹
- in view of the 'quantitative' evolution of the individual management of rights; or
- in view of the technical problems that could arise in connection with the individual management of rights.

It is worth noting that the 'quantitative' evolution of the individual management of rights seems to be a concept that is extremely close to the arguments put forward by SACEM with regard to the financial risks that the individual management of rights entails.

The problem with the 'quantitative' evolution exception lies in determining what number of authors wishing to manage their rights individually is necessary before it becomes impossible to accept more applications for individual management. There are no clear parameters available in this regard. However, it is also true that this is a difficult question to be answered at the outset.

Furthermore, if the 'quantitative' evolution of the individual management of rights makes it necessary to refuse an application, not only that application should be refused but, as of such date, all new applications should also be refused. In that case, the refusal will be the rule rather than the exception.

The 'quantitative evolution' exception also seems to suggest that the individual management of rights is only feasible if the number of authors who choose this option remains low. If this holds true, the argument put forward by SACEM to the effect that the individual management of rights must be limited because it creates a risk for the whole functioning of collecting societies was not completely irrelevant.

Extreme cases can also be foreseen. Some collecting societies, as it is the case for SGAE in Spain, have both publishers and authors amongst their members. It only needs one or two of the major publishers to apply for individual management of rights to mean that the 'quantitative' volume of rights withdrawn from the collective management is such that it could be justifiable to refuse the application.

The 'technical problems' exception also merits some attention. The Commission provided some examples of what 'technical problems' could be: they include the identification and categorization of internet-related rights, identification of the forms of utilization of works according to categories of rights, identification of the rights that are still managed by the collecting society and the impact on the reciprocal representation agreements concluded with other collecting societies.

We think that it is legitimate for a collecting society to refuse applications for individual management of rights on grounds of technical problems, but the implementation of this possibility brings more legal uncertainty to collecting societies as well as unforeseen side effects.

⁴⁹ This requirement is provided for in Article 34 of SACEM's statutes and was explicitly accepted by the Commission in *Daft Punk*.

The above list of technical problems is not exhaustive. Thus, other technical problems may arise that justify the refusal of an application for individual management of rights. It goes without saying that, in such circumstances, the author could think that such a refusal is in breach of Article 82 EC.

Some of the examples provided by the Commission may appear to be a legitimate ground for refusing an application in the first years after the individual management of rights is implemented, but they could hardly be considered as a valid excuse after some years of experience. In contrast, other technical problems will only appear if the individual management of rights becomes a mass choice amongst the members of the association.

In short, it is unclear to what extent a collecting society's own technical problems could be a legitimate ground for imposing the collective management of rights on its members.

3. *Daft Punk* and the level of fees

The *Daft Punk* Decision makes no reference to the fees charged to members who do not assign all their rights to SACEM pursuant to the *Daft Punk* clause.

However, when SACEM amended its statutes, it also modified the rules relating to the fees charged to its members. This amendment provided that SACEM could decide, on a case-by-case basis, to charge different fees to members who do not assign all of their rights to SACEM.⁵⁰

This amendment seems to us to be objectively justified and demonstrates that there are less restrictive ways of avoiding the financial risks of creaming-off. If a collecting society's member does not assign all his or her rights to SACEM, this could create an additional administrative cost for the collecting society, as the latter must identify which users must pay and which users need not pay for the use of the member's works. The collecting society must also bear the additional accounting burden and face the management of a heterogeneous repertoire. Furthermore, the collecting society will face substantial difficulties in 'explaining' to users why the licence only covers a limited number of rights for certain works.

This supplementary fee seems legitimate in as much as it bears a reasonable relation to the additional cost that the individual management of rights creates. The fee enables the collecting society to cover the increase in its operating expenses without creating an additional economic burden for members who assign all of their rights to it. The fee therefore also eliminates a significant part of the risks for the collective management of rights linked to the creaming-off of rights.

Nevertheless, the supplementary fee could raise some new problems for collecting societies. The fee makes it easy for any unhappy author to allege that he is being 'penalised' for not assigning all of his rights to the collecting society. This author could simply refer to the extensive case law condemning loyalty rebates as almost a *per se* violation of Article 82 EC, and in particular could accuse the collecting society of applying its fees in a manner that enhances the fidelity of its members and discourages the individual management of certain rights. Such an interpretation cannot be ruled out, but in our view it is not in the spirit of the supplementary fee. Nor should it be deemed

⁵⁰ Article 34 of SACEM's statutes states: « *Toutefois, les charges de gestion spéciales pouvant résulter de la limitation des apports donneront lieu, le cas échéant, par décision du Conseil d'administration à la déduction supplémentaire pour frais correspondante* ».

to be a discriminatory measure: an author who assigns all his or her rights to a collecting society is not in the same situation as an author who only assigns some of them (thus creating additional operating expenses for the collecting society and breaking the balance between the different fees).

However, as a matter of proof, it will not be easy for the collecting society to demonstrate that the supplementary fee bears a reasonable relation to the additional costs incurred by it. The additional operating costs relating to the individual management of rights could fluctuate over time. The additional costs will depend on the number of authors who have chosen this possibility and the experience gained over time by the collecting society in assessing the amount of the additional operational costs.

One can also foresee another issue. It is clear that operational costs may vary substantially from one right to another. The actual fees policies, however, reflect a balance based on the solidarity principle. If a substantial number of members of a collecting society were to withdraw those rights that entail less operational costs, that balance would disappear. In such a case, the managing fees charged by the collecting society should rise substantially for the most complicated rights.

In short, the individual management of rights could legitimately entail substantial increases in the fees charged to those who individually manage their rights. However, the implementation of additional fees will certainly bring more legal uncertainty for collecting societies and is a potential source of conflict.

4. *Daft Punk* and the Spanish case

SGAE, the Spanish collecting society, numbers both authors and publishers amongst its members. In 2002, five major publishers (UIP, BMG, Sony, EMI and Peermusic, hereinafter, the ‘majors’) brought a complaint against SGAE before the Spanish Competition Service.⁵¹

These publishers claimed that SGAE had prevented them from individually managing their rights. SGAE contended that its statutes entitled its members to ask for a derogation of that general rule. Some time after the complaint was lodged, the Commission published its decision in the *Daft Punk* case. In 2003, SGAE decided to amend its statutes including the clause agreed by the Commission and SACEM in that case.

In view of the amendment of SGAE’s statutes, the Spanish Competition Service decided to close the proceedings against SGAE in 2004. The five majors filed an appeal against this decision before the Spanish Competition Court,⁵² which was dismissed in a landmark ruling in December 2004.⁵³

We would like to point out some aspects of the ruling of the Spanish Competition Court.

The practices of SGAE have been closely scrutinized by the Spanish competition authorities since the early Eighties. None of the previous decisions involving SGAE took account, implicitly or explicitly, of the legitimate aims pursued by collecting societies. Furthermore, in most of those decisions, the competition authorities

⁵¹ That is, the *Servicio de Defensa de la Competencia*.

⁵² The *Tribunal de Defensa de la Competencia*.

⁵³ Decision of the Spanish Competition Court of 16 December 2004 in proceeding number R 609/04, *Ediciones Musicales*.

considered that collecting societies usually enjoyed a *de facto* monopoly and thus adopted a very tough position towards SGAE.

However, in its 2004 decision, the Spanish Competition Court took due account for the first time of the aims pursued by SGAE and struck a careful balance between the interests at stake. The Spanish Competition Court also acknowledged that SGAE was in a “*special legal position*”: under Spanish law the collective management of rights fulfils a social task which must be carried out by non-profit associations. Following the ECJ in *SABAM II*, the Spanish Competition Court also stated that collecting societies may impose some restrictions on their members with a view to ensuring an effective collective management of rights, provided that such restrictions are proportional to the aims pursued.

What makes this case interesting is that, in *Daft Punk*, the complainants were authors, while in the Spanish case the complainants were the five major publishers. Thus, in the Spanish case it was necessary to protect the rights of some of SGAE’s members (the authors) against the complainants themselves, who were also members of SGAE. It was necessary to ensure a balance not only between the interests of the members of SGAE and the need for an effective management of their rights by a collecting society, but also between the interests of the members themselves.

This brings us to some important issues which were not dealt with by the Spanish Competition Court: whether or not the reasoning of the Commission in *Daft Punk* was fully applicable to publishers.

As we have said before, the Commission considered that one of the reasons to open the door to the individual management of rights was that it reinforces the moral rights of the author. Obviously, this reason cannot be applied to publishers.

In *Daft Punk*, the Commission also insisted on the fact that only a few collecting societies impose limits of this kind, which proved that there was no risk of a creaming-off of rights. This argument is not easily transposable to the individual management of major publishers’ rights. Each major publisher holds the rights of a huge number of works. Thus, if a publisher withdraws some of its rights, the risks of creaming-off and the prejudice for the financial equilibrium of a collecting society is much higher than it is in the case of authors.

Moreover, as we mentioned before, it cannot be ruled out that it only takes one or two of the major publishers to apply for individual management of rights before the ‘quantitative’ volume of rights withdrawn from collective management could be such that the collecting society might find itself justified in refusing the application in view of the ‘quantitative’ evolution of the individual management of rights. This case provides another excellent example of the importance of striking a proper balance of the interests of authors and the record industry — a ‘*rule of reason*’ approach — and of avoiding a *per se* approach. Moreover, the case also shows that such a balance of interests must be the outcome of a thorough examination of the interests at stake, of the structure of the market and of competition conditions prevailing at the time the competition authority adopts each decision.

F. Conclusion

The compatibility of collecting societies’ practices with EC competition law has been examined several times by the national and European authorities, and one can expect that this scrutiny will continue in the future.

While the real limits arising from Article 82 EC are unclear for any dominant undertaking, this is even more so for collecting societies. The case law on collecting societies is still scarce and the principles laid down in said case law are vague. Furthermore, the general principles of competition law should be applied to collecting societies taking into account their specific nature and role and ensuring a proper balance of all the interests at stake.

This lack of guidance certainly creates a high degree of legal uncertainty for collecting societies, which results in ambiguous practices. If collecting societies must operate against a background of ambiguity in terms of what they can and cannot do under Article 82 EC, one can expect them to remain the 'usual suspects' for a long time to come.